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No. 82-808

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN MAURICE SHAY,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FIFTH SUPREME JUDICIAL DISTRICT

Kerry P. FitzGerald
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Dallas, TX 75219
214/526-6817

COUNSEL FOR PETITIONER

QUESTION PRESENTED

The judgments of conviction of forgery should be set aside and new trials granted as no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

TABLE OF CONTENTS

	Page
Question Presented	2
Table of Contents	3
Table of Authorities	4
Opinion Below	5
Jurisdictional Statement	5
Constitutional Provision Involved . .	5
Statement of the Case	6
Reasons for Granting the Writ	8
Prayer	11
Certificate of Service	13
Statement of Counsel	14
Notary Statement	15
Exhibit A	
Exhibit B	
Exhibit C	

TABLE OF AUTHORITIES

Page

Jackson v. Virginia, 443 U.S. 307 11

Phleging v. State, 572 S.W.2d 517 11

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas is attached hereto as Exhibit A.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fifth Supreme Judicial District was entered on May 4, 1982. Petitioner's Motions For Rehearing in the Court of Appeals were overruled on June 17, 1982. The Court of Criminal Appeals refused Petitioner's Petitions for Discretionary Review on September 15, 1982. See Exhibit B. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The Petitioner was charged in two separate indictments with passing a forged instrument, that is, with intent to defraud and harm another, the Petitioner passed to the Complainant a forged writing knowing same to be forged.

On October 21, 1979, the Complainant's girlfriend, while doing her laundry at a public washateria, began chatting with Petitioner casually and eventually talked about traveling. She indicated that she and the Complainant intended to take a trip to New York over the Thanksgiving holidays. Petitioner said he had some discount airline tickets and would be happy to sell some to her. She called the Complainant who came to the washateria and agreed to buy two of the coupons at $25.00 per coupon. When Petitioner declined to accept a check, the Complainant's girlfriend went to a grocery store, cashed a check, and returned and gave the

Petitioner $50.00 in cash. Petitioner identified himself as Neil Simon. When the Complainant asked for his phone number in the event he wanted additional coupons for his friends, Petitioner declined to give same as it was unlisted. The following day the Complainant determined the coupons were counterfeit. Subsequently, the Complainant and his girlfriend saw the Petitioner or the Petitioner's wife and child at the same washateria. On one such occasion they followed him to his apartment complex where they determined where he lived. Later they determined where he worked. They also had Petitioner's license number from his vehicle.

The Complainant saw the Petitioner at a barbecue place near the washateria some time later but did not mention the counterfeit coupons.

Likewise, the Complainant's girlfriend had occasion to see Petitioner's wife and child at the laundromat some time after the

purchase of the coupons. At this time, Petitioner's wife said "If you will let me know where you live or your address or your telephone number, I will see that you get the money back" (RII-60,65). She, however, refused to give her name or address (RII-60, 65).

The question presented for review, that the evidence is insufficient to support the judgments of conviction, was presented at the first stage of this appeal.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the State has failed to demonstrate guilty knowledge on the part of Petitioner that the coupons were forged or that Petitioner had intent to defraud.

Section 32.21 of the Texas Penal Code provides:

> "(b) A person commits an offense if he forges a writing with intent to defraud or harm another."

The State's case basically shows that the Complainant's girlfriend and Petitioner talked casually about travel plans, that Petitioner offered to sell her several American Airlines coupons and did so for $50.00 in cash. The State relied primarily upon Petitioner's insistence upon cash, his refusal to give the Complainant his telephone number, and the Petitioner's identifying himself with a fictitious name, to support the judgment of conviction.

Petitioner submits that while the giving of a fictitious name is suspicious, the other circumstances are as consistent with innocent activity as with guilty activity. By requesting cash as opposed to a check, Petitioner did not run the risk that he would be paid with a hot check and he was assured of payment. The Petitioner had an unlisted phone number and this is certainly not uncommon; further, it is common knowledge that an individual seeks an unlisted number in

order to severely restrict public knowledge as to said telephone number. The State's case then hinges upon the giving of a fictitious name.

However, it should be also emphasized that Petitioner and his wife and child continued to use the same laundromat after this transaction and made no secret of their comings and goings. Further, when the Complainant's girlfriend braced the Petitioner's wife concerning the transaction, Petitioner's wife immediately advised that she would get her money back if she would only give her name and address, but the Complainant's girlfriend in turn refused. This latter incident obviously reflects an intent to reimburse for any loss suffered and further corroborates that Petitioner did not have the intent to cheat or defraud any person. It is uncontroverted that Petitioner and his family lived nearby the laundromat and that he officed within several doors

of the laundromat and was in no way trying to hide or absent himself from the scene where the transaction took place.

There is no evidence in the record that Appellant ever made an incriminating statement or that he ever tried to flee the scene.

Petitioner submits that after reviewing the evidence in the light most favorable to the Prosecution, no rational trier of fact could have found the essential elements of this crime as charged in each indictment beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Phleging v. State, 572 S.W.2d 517 (Tex. Crim. App. 1978).

WHEREFORE, PREMISES CONSIDERED, the Petitioner respectfully prays that a Writ of Certiorari should issue to review the opinion of the Texas Court of Criminal Appeals and that subsequent thereto, that the judgments of conviction will be reversed and

judgments of acquittal entered herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition were mailed with first-class postage prepaid to Mr. Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas, on the 9th day of November, 1982.

KERRY P. FITZGERALD

No.

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STATEMENT OF COUNSEL

COUNTY OF DALLAS)

STATE OF TEXAS)

My name is Kerry P. FitzGerald and I am Counsel of Record for Nathan Maurice Shay. I deposited in a United States Post Office in Dallas Texas, with first-class postage prepaid, addressed to the Clerk of the United States Supreme Court, 40 copies of the Petition For Writ of Certiorari on the 9th day of November, 1982, which was within the time permitted to file said Petition.

KERRY P. FITZGERALD

SUBSCRIBED AND SWORN TO before me by Kerry P. FitzGerald on this the 9th day of November, 1982.

Notary Public in and for the State of Texas, County of Dallas

My commission expires on: January 25, 1986